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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

GENAH MICHELLE SIMPSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 45A05-0511-CR-666

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas P. Stefaniak, Jr., Judge
Cause No. 45G04-0310-FD-199

October 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Genah Michelle Simpson appeals her conviction, after a jury trial, on one count of theft as a class D felony.

We affirm.

ISSUE

Whether sufficient evidence supports the conviction.

FACTS¹

On the morning of September 7, 2003, Dean Fanno knocked over three prescription pill bottles on the shelf of his bathroom linen closet. He picked up the three bottles. As he did so, he heard “something rattling around inside” the bottles and saw that each contained pills. (App. 56). Fanno then put the pill bottles on the shelf.

Fanno’s home in Schererville was listed for sale, and an open house of the home began at 1:00 p.m. that day. Michelle Bagull, his real estate agent, was present to conduct the open house. Shortly after the open house began, Simpson arrived. Bagull recognized Simpson as a fellow commuter train rider. Simpson spent about ten minutes touring one level of the home. She then asked whether she could wash her hands. When Bagull agreed, Simpson went into the bathroom – leaving the door open about six inches. After a few minutes, Bagull went to the doorway. Simpson “became startled when she saw Bagull and then quickly shut the linen closet door.” (Tr. 157). Simpson left “shortly

¹ We remind Simpson’s counsel that that the statement of facts in an appellate brief should be a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment and should not be argumentative. *King v. State*, 799 N.E.2d 42, 51 n.2 (Ind. Ct. App. 2003) (citing Ind. Appellate Rule 46(A)(6)).

thereafter” and “didn’t view the lower level of the home, which was living space.” (Tr. 90, 91). As Simpson drove away, Bagull noted the license plate number of her vehicle. Bagull then went to the bathroom and looked in the linen closet; she saw two empty prescription pill bottles – with their “tops ajar or askew” – on the shelf of the closet. Bagull called Fanno.

When Fanno came home, he verified that the two pill bottles “were empty.” (Tr. 55, 74). He called the police. Fanno reported to the police that the empty bottles had contained Oxycontin and Hydrocodone pills that morning. Bagull informed the police that Simpson had been the only visitor to the house before she saw the two empty pill bottles.

On October 10, 2003, the State charged Simpson with the theft of “Oxycontin and Hydrocodone pills of Dean Fanno.” (App. 8). Simpson was tried by a jury on June 13, 2005. Fanno testified that he did not know Simpson and had not authorized her to take the pills. Bagull testified that she had found Simpson’s request to wash her hands “very unusual.” (Tr. 87). Detective Calderaro of the Schererville Police Department testified that when she investigated the case in September of 2003, Bagull described Simpson’s behavior as “not really typical of people looking at a home, . . . that she went to the kitchen, looked in the cabinets and then asked to use the washroom to wash her hands.” (Tr. 148-49). Calderaro further testified that Bagull told her that when she went to the bathroom, “she walked past the bathroom and the door was partially ajar. And she could see [Simpson] inside the linen closet.” (Tr. 149). On cross examination, the defense asked Calderaro a series of questions based upon the probable cause affidavit prepared by

Calderaro. Calderaro's answers included her testimony that Bagull had told her that when she was at the bathroom door, Simpson "became startled when she saw Bagull and then quickly shut the linen closet door." (Tr. 157).

The jury convicted Simpson as charged.

DECISION

When addressing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *McHenry v. State*, 820 N.E. 2d 124, 126 (Ind. 2005). Moreover, we "must consider only the probative evidence and reasonable inferences supporting the verdict." *Id.* Thus, we "must affirm" if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* "In reviewing a claim of insufficient evidence, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment and neither reweighing the evidence nor judging the credibility of the witnesses, we conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Dunlap v. State*, 761 N.E.2d 837, 839 (Ind. 2002).

Simpson first argues that there is insufficient evidence that "there was in fact a stealing" of the pills. Simpson's Br. at 9. Specifically, she posits that "people keep empty prescription pill bottles," and although Fanno testified that the three bottles contained pills that morning, "there is no clear evidence" that those bottles were "the pill bottles that were empty that night." *Id.* at 10. Simpson simply invites us to reweigh the

evidence – Fanno’s testimony – and to discount the reasonable inferences drawn therefrom. This we do not do. *See Dunlap*, 761 N.E.2d at 839.

Next, Simpson argues that “this case is entirely based on circumstantial evidence” because she “was never identified as being in Fanno’s linen closet.” *Dunlap’s Br.* at 11. As recounted in FACTS, the jury did hear testimony indicating that Simpson was seen standing before the open door of the linen closet.

Simpson argues that the evidence provides insufficient inferences “based on uncontested facts” that are “logical” and “supported by probability” to support a guilty verdict. *Simpson’s Br.* at 12. She cites *Marrow v. State*, 699 N.E.2d 675 (Ind. Ct. App. 1998). In *Marrow*, the defendant was convicted of the burglary of a shed and theft of tools inside. The defendant’s keys were found in the shed – the normally closed door of which had been observed standing open for several hours. Various tools were reported to have been stolen from the shed. The defendant testified that his keys had been lost earlier that month; another witness corroborated this testimony. We found the evidence not sufficient “to prove beyond a reasonable doubt that Marrow was the one that possessed and dropped the keys in the shed or that the keys were dropped at the time the burglary and theft occurred.” 699 N.E.2d at 678. Simpson does not attempt to analogize *Marrow* to her case, and we do not find it particularly helpful.

Simpson also asserts that there “is absolutely no evidence of flight by Simpson” which could be used to show “consciousness of guilt to support an inference of guilt.” *Simpson’s Br.* at 16, 15. She reminds us that she signed her name to the guest sheet and made no effort to conceal her identity. However, her assertion is not persuasive

inasmuch as Bagull had recognized Simpson. Further, as the State observes, consciousness of guilt is not an element of the offense of theft; thus, it was not something that the State was required to prove at trial.

Simpson further argues that because she “did not flee” or attempt to conceal her identity, and “[t]here is no direct evidence, other than conjecture or speculation, that Simpson went through the linen closet,” her “mere presence” in the bathroom so as to have the “opportunity” to commit theft is “insufficient to sustain” her conviction. Simpson’s Br. at 19, 28. Again, her assertion fails to acknowledge Detective Calderaro’s testimony that Bagull had told her she saw Simpson standing before the open linen closet. Further, as she “acknowledges[,] . . . presence at the scene in connection with other facts or circumstances tending to show participation in the crime may be sufficient to support a conviction.” Simpson’s Br. at 18 (citing *Manna v. State*, 440 N.E.2d 474, 475 (Ind. 1982)). Calderaro also testified, upon cross-examination, that her written report – based upon her interview with Bagull – stated that Simpson was “acting suspiciously” at the open house. (Tr. 155). Further, Bagull testified that she “thought it was odd” that Simpson “asked to wash her hands,” that she “had the door closed partially to wash her hands,” and that she “didn’t view the lower level of the home, which was living space.” (Tr. 91). Thus, there was evidence of other circumstances tending to show Simpson’s participation in theft.

Simpson next asserts that because the police did not take the empty pill bottles into custody and have them examined for fingerprints, this “failure” constitutes “a *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 215 (1963) violation.”

Simpson's Br. at 20. *Brady* held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Carroll v. State*, 740 N.E.2d 1225, 1229 (Ind. Ct. App. 2000) (quoting *Brady*, 373 U.S. at 87) (emphasis added). There is no *evidence* that Simpson asserts to have been in the possession of the State and denied to her. Therefore, she can show no *Brady* violation.

Finally, Simpson suggests that we turn to *Cantrell v. State*, 673 N.E.2d 816 (Ind. Ct. App. 1996), *trans. denied*, as "the proper way for this Court to resolve her conviction on the circumstantial evidence presented at trial." Simpson's Br. at 22. There, we reversed Cantrell's conviction for burglary, stating that it was "not enough that the defendant" had been seen at the scene of the burglary when there was no other evidence "which connects Cantrell with the break-in of the house." 673 N.E.2d at 819, 820. Cantrell had been seen in the driveway of the burglarized home "from 1:15 p.m. until shortly after 2:00 p.m." on the day of the burglary, which occurred "sometime between 12:15 p.m. and 6:30 p.m." *Id.* at 817. Here, the reasonable inference from Fanno's testimony² is that the pills were in their bottles in the linen closet when the open house began. Simpson was the only visitor to the house before Bagull saw the two empty pill bottles, with their caps askew, on the shelf of the bathroom linen closet. Simpson made the unusual request, after having viewed multiple rooms of the house, to wash her

² Of course, the matter of Fanno's credibility was a matter for the jury to decide. *See Dillard v. State*, 755 N.E.2d 1085, 1090 (Ind. 2001).

hands; she spent a few minutes in the bathroom with the door ajar; and she was then seen standing before the open linen closet. This is “circumstantial evidence . . . which connects” Simpson with the theft of the pills. *Id.* at 820. Therefore, *Cantrell* does not compel our finding that insufficient evidence supports her conviction.

In her reply brief, Simpson makes much of the fact that the State cited the probable cause affidavit as the source of its factual assertions (1) that Bagull had noted that Simpson was acting suspiciously, and (2) that Bagull saw Simpson was standing before the open linen closet. These facts cannot be considered, Simpson argues, because although the probable cause affidavit is included in Simpson’s Appendix, it was not admitted into evidence.³ Further, Simpson argues, the “alleged statements of Bagull” in the probable cause affidavit “were inadmissible hearsay.” Reply at 2. Simpson’s argument must fail because the testimony of Detective Calderaro about what she wrote in her report and what Bagull told her were elicited by Simpson on her cross-examination.⁴ Having invited the error of which she now complains, Simpson may not “take advantage of” that error on appeal. *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005).

³ Our reference to such facts does not cite to the probable cause affidavit but to testimony heard by the jury.

⁴ Simpson first confirmed that Calderaro had executed the probable cause affidavit, then showed her a copy that Simpson had marked as an exhibit, and then asked her to confirm that the affidavit said that “a white female subject acting suspiciously had entered the home.” (Tr. 155). Calderaro confirmed it. Simpson further asked whether the affidavit stated, “Genah Simpson became startled when she saw Bagull and then quickly shut the linen closet door, is that what it says?” (Tr. 157). Calderaro agreed. Simpson then asked Calderaro whether “Bagull [told her] that,” and Calderaro answered in the affirmative. *Id.* Simpson further pursued Calderaro’s confirmation as to the person who “told you that,” and Calderaro answered, “Miss Bagull.” (Tr. 158). Finally, Simpson read from the affidavit that “Miss Bagull immediately checked the bathroom linen closet and discovered that two prescription pill bottles had their lids off of them,” and asked, “correct?” *Id.* Calderaro answered, “Correct.” *Id.*

The jury heard evidence establishing that the pills were in the pill bottles on a shelf in the bathroom linen closet before the open house commenced; that Simpson's behavior at the open house was found to be suspicious by the agent; that Simpson was in the bathroom and seen standing before the open linen closet; and that shortly thereafter, the agent saw two empty pill bottles on the shelf in the linen closet. This is sufficient evidence to support the jury's conclusion that Simpson committed theft of the pills.

Affirmed.

RILEY, J., and VAIDIK, J., concur.